IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 332 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : YES

5. Whether it is to be circulated to the Civil Judge? : NO

B M MANDALIA

Versus

MANAGER

Appearance:

MR PH PATHAK for Petitioner

MR MITUL SHELAT for MR SN SHELAT for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 29/10/1999

ORAL JUDGEMENT

Shri Pathak, the learned advocate for the petitioner workman and Shri Shelat, the learned advocate for the respondent. In the present petition, the award passed by the Industrial Tribunal, Ahmedabad ("The Tribunal" for short) in reference NO. IT 265 of 1976 dated 22nd June, 1987 is challenged by the petitioner workman. Under the impugned award, the Tribunal has

rejected the reference and has also rejected prayer of the petitioner for reinstatement with continuity of service will full back wages for the intervening period. Feeling aggrieved by the said impugned award, the petitioner has approached this Court by way of this petition under Article 227 of the Constitution of India.

This Court, while admitting this petition by issuing rule thereon, has refused the interim relief.

The facts of the present case, in short, are that the petitioner was dismissed from service on 25th October, 1975 by the respondent. According to the petitioner workman, he had joined the services of the respondent bank on 28th January, 1966 and was working as Account Clerk at Rajkot. That the petitioner was served with a chargesheet wherein serious allegations against the petitioner were levelled in respect of dishonesty and misappropriation. In all, four charges were levelled against the petitioner. Said chargesheet was produced before the tribunal vide Exh. 5/1 and reply thereto given by the petitioner was produced at Exh. 5/2 in which it was pointed out that it was a bona fide mistake in calculation and there was no intention on his part to misappropriate the amount as alleged and also there was no any dishonest intention as alleged. Since the petitioner had challenged the legality and validity of the departmental inquiry before the tribunal, the tribunal decided the said preliminary issue vide Exh. 11 and came to the conclusion that the departmental inquiry which was conducted against the petitioner is illegal and invalid and against the principles of natural justice. The Tribunal has given permission to the respondent to prove and establish the misconduct levelled against the petitioner by leading oral evidence against the petitioner before the tribunal. The respondent has examined one Ibrahimkhan Babarkhan and the District Officer of the Bank vide Exh. 15 in the proceedings. The petitioner had examined one Bhupat ManilalMandalia at Exh. 20 and has produced necessary documents vide Exh. 5, 10, 12 and 13. After documentary evidence and the oral evidence was led and produced before the tribunal, the tribunal has examined the entire case on merits as if the inquiry was conducted before the tribunal.

After considering the entire evidence on record, both oral as well as documentary, in respect of issue No. 8, the tribunal has come to the conclusion that out of four charges, the first two charges were found to be proved and the remaining two charges were not found to be proved against the petitioner workman. The first two

charges levelled against the petitioner were in relation to item no. 1 allegation that the petitioner has temporarily misappropriated an amount of Rs. 491.13 ps. for a period of twenty days and as regards item no.2, to temporarily misappropriate an amount of Rs. 630.11. As regards item no. 3 and 4 which also relate to temporary misappropriation, the tribunal found that the same were not found to have been proved against the petitioner beyond reasonable doubt and the tribunal accordingly answered issue no. 8.

Thereafter, the tribunal has examined the propriety of the punishment of dismissal in view of charges which have been found to be proved. Ultimately, the Tribunal has come to the conclusion that it was an intentional action to temporarily misappropriate the amounts and just to conceal the said fact of misappropriation, the records have been tampered with by the petitioner workman on the assumption that this fact of misappropriation may not come to the knowledge of the respondent bank. Therefore, considering the gravity and seriousness of the misconduct as also considering the fact that whatever misconduct has been found to have been proved against the petitioner, it is a criminal offence punishable under section 465 and 467 and 468 of the Indian Penal Code and, therefore, such workman cannot be reinstated in service. The tribunal, therefore, found that the punishment of dismissal imposed on the petitioner is just and proper and, therefore, the tribunal ultimately rejected the reference under its impugned judgment and award dated 22.6.1987 which is under challenge in this petition before this Court.

I have heard the learned advocates for both the sides. Mr. Pathak, the learned advocate for the petitioner has submitted that two misconducts which were found to be proved out of four are not such serious which would warrant the extreme punishment of dismissal from service. He has also pointed out that the past record of the petitioner is clean and unblemish. Therefore, in such a situation, extreme punishment of dismissal cannot be imposed upon the petitioner and the tribunal has committed gross error in rejecting the reference while exercising the discretion under section 11A of the Industrial Disputes Act, 1947 ("the ID Act" for short). On the other hand, Mr. Shelat, learned advocate appearing for the respondent bank has submitted that two charges which were found to have been proved are the charges which are serious in nature which relates to dishonesty and misappropriation and, therefore, in such cases, the workman should not be reinstated in service.

According to him, even one single charge is enough to dismiss an employee who is having a post of confidence. Mr. Shelat has relied on the decision of the apex court reported in AIR 1992 SC 2188 and has pointed out that take, for instance, that the delinquent has put in total 29 years of service and has got unblemish record, in 30th year, if he commits defalcation of public money or fabricates the record to conceal the misappropriation, he commits such misconduct once, for the first time. Should it mean that he should not be visited with the punishment of dismissal if the said charge levelled against him is proved. Therefore, according to Mr. Shelat, even a single act of corruption is sufficient to warrant the order of dismissal. Mr. Shelat has also relied upon the judgment of the Division Bench of this Court reported in 1993(1) GLR 302. He has also submitted that the view taken by the tribunal is in consonance with the settled principles of law which is not required to be interfered with by this court while exercising the extra ordinary powers under Article 226 and/or 227 of the Constitution of India since the tribunal has committed no error and no infirmity has been pointed out by the learned advocate for the petitioner.

Mr. Pathak has raised one contention before this Court that before passing the order of dismissal against the petitioner, the departmental inquiry was conducted against the petitioner and, thereafter, the petitioner was dismissed from service by order dated 25th October, 1975 with effect from 28th October, 1975. He has pointed out that before the tribunal, the petitioner has challenged the legality and validity of the departmental inquiry held against him. The said issue has been decided by the tribunal vide Exh. 11 in favour of the petitioner and the tribunal has concluded that the departmental inquiry which was conducted against the petitioner workman is illegal, invalid and contrary to the principles of natural justice. Said order passed by the tribunal vide Exh. 11 has not been challenged by the bank before this court. On the contrary, said order has been accepted by the respondent bank and as a consequence thereto, the respondent bank has led oral evidence to prove the misconduct against the petitioner workman and, therefore, according to the submission of Mr. Pathak, earlier order of dismissal dated 25th October, 1975 based on the earlier departmental inquiry which was declared as invalid must be set aside because the earlier order of dismissal is based on such illegal inquiry and, therefore, same cannot sustain and, therefore, the petitioner is entitled to receive the wages from the date of dismissal till the date of award in as much as the

principle of relate back is not applicable. He has also pointed out that the workman is entitled to the benefit of inquiry being declared vitiated by the tribunal. Mr. Pathak has relied on the decision of the apex court reported in AIR 1980 SC 1876 in case of Gujarat Steel Tubes versus Mazdoor Sabha and has pointed out that when an inquiry which was conducted by the respondent bank is declared invalid, then, in such a situation, the principle of 'relate back' is not applicable.

On the other hand, Mr. Shelat has pointed out one decision of the apex court reported in AIR 1997 SC 2661 in the matter of Punjab Dairy Development Corporation Ltd. Versus Kala SIng and has pointed out that in this decision of the apex court, it has been categorically held that the labour court as well as the tribunal while recording the finding that the domestic inquiry was defective and giving opportunity to adduce evidence by the management and the workman and the recording of finding of dismissal being invalid, it would relate back to the date of the original dismissal and not from the date of judgment of the labour court. He has also pointed out the decision of the apex court reported in AIR 1997 SC 633 wherein also same principle has been laid down by the Hon'ble apex court. Mr. Pathak has also relied on the decision of the apex court reported in AIR 1998 SC 185 and has pointed out that recently, the apex court has taken view considering the case of P.H.Kalyani that in case of no inquiry, principle of relate back cannot be made applicable and this issue has been referred to the larger bench of the apex court. Mr. Shelat has also pointed out the decision reported in AIR 1997 SC 2661 which is a decision given by the bench consisting of 3 Judges which has to be considered by the Full Bench of the apex Court. He has submitted that it is the precedent that the existing law should be followed while relying upon the decision reported in 1988 (3) JT 363 and also while relying upon the decision reported in AIR 1973 Orissa 136. It is the submission of Mr. Shelat that the decision of the apex Court reported in AIR 1997 SC 2661 would govern the field in respect of principle of 'relate back' when the departmental inquiry is declared vitiated by the tribunal and, therefore, the view taken by the apex court in decision reported in AIR 1998 SC 185 is the case of 'no inquiry' and said issue has been referred to the larger Bench and now cannot be considered in light of the facts of the present case. In this case, the departmental inquiry has been held to be defective and it is not a case of 'no inquiry' and, therefore, existing law which has been laid down by the apex court

shall have to be followed being the precedent decided by the apex court and the Court shall not have to consider that the said issue has been referred to the larger Bench and unless and until the said decision reported in AIR 1997 SC 2661 is over rulled by the larger bench, the law which has been laid down in the said decision is binding to this Court.

I have considered the submissions made by both the learned advocates. I have also considered the judgments cited by the learned advocates for both the sides. I do agree with the proposition that the law which has been decided by the apex court in a decision reported in AIR 1997 SC 2661 is holding the field unless and until the same is over rulled by the larger Bench of the apex Court, in future.

The important question is the departmental inquiry which has been conducted by the employer. Then, it has to be considered as to whether the same is legal and valid or not. It is the duty of the employer to held the departmental inquiry in accordance with the statutory rules and also in accordance with the principles of natural justice. But, while holding the departmental inquiry, if the reasonable opportunity is not given to the workman or if there is no compliance of the principles of natural justice or the binding statutory rules are not followed by the disciplinary authority while conducting the departmental inquiry, in such circumstances, the labour Court or the industrial tribunal, as the case may be, while examining the preliminary issue as to whether the departmental inquiry conducted by the employer is legal and valid or not, if it comes to the conclusion that the departmental inquiry is vitiated and is not held in consonance with the statutory rules as also the principles of natural justice, then, the net result of such conclusion on such preliminary issue would be the finding that the dismissal order based on such defective inquiry must go and the same cannot sustain. Therefore, the question would require the close examination by giving opportunity/chance to the employer to prove the misconduct before the labour court or the industrial tribunal by leading the oral as also documentary evidence as if it is a departmental inquiry before the independent authority and in such a situation, benefit of holding defective inquiry would go to the employer because the employer is getting an opportunity to rectify the mistake and to cure the defect and fill up the gaps and to procure the evidence and prove the misconduct before the labour court or the industrial tribunal. In such a

situation, when the departmental inquiry is held to be vitiated as per the finding of the labour court or the tribunal on the preliminary issue about the legality of the departmental inquiry, what would be the status of an employee after declaring the inquiry to be defective before the labour court or the industrial tribunal ? If the workman has been dismissed from service and has remained as such, then, the employer is having no right to hold the departmental inquiry against the dismissed employee. In that situation, it is necessary that the relationship of employer and the employee is established between the employer and the delinquent because in absence of such relationship, the departmental inquiry cannot be held against the dismissed employee. The delinquent, dismissed employee is seized to be the workman of an employer and the employer has no right to hold the departmental inquiry against the dismissed employee. Therefore, for establishing such relationship between the employer and the delinquent, it is necessary that the delinquent is paid subsistence allowance by the employer just to prove and establish relationship of employer and employee. In such a situation, the delinquent is required to be treated as an employee under suspension. According to my view, in absence of such relationship, the departmental inquiry cannot be held before the labour court and the industrial tribunal. The Hon'ble Supreme Court has held in case of Motipur Sugar Factory, reported in AIR 1965 SC 1803 that the 'defective inquiry' and 'no inquiry', both are on the same footing. In the said decision, the apex court has held that why the opportunity is given to the employer in case of 'no inquiry' and 'defective inquiry' to prove the misconduct before the labour court or the tribunal is that if such chance or opportunity is not given to the employer, then, in such a situation, the employer would be required to hold departmental inquiry against the workman and then deciding the question of penalty by the employer. The apex Court has considered this situation and anxiety was pointed out that in such a situation, if while remanding the matter back to the employer for holding departmental inquiry a fresh, then, if the employer commits the same mistake and if again the reasonable opportunity is not given to the workman and the inquiry is conducted in violation of the principles of natural justice as also the statutory rules, then, there will be second round of litigation by the workman against the employer either before the labour court or the tribunal as the case may be and then the labour court or the tribunal again will have to examine the very same issue as to whether the departmental inquiry conducted by the employer is legal and valid or not and whether the same is in consonance

with the binding statutory rules as also the principles of natural justice or not. Therefore, to avoid such marry go round situation and such duplication, the apex court has considered it better and in the interest of both, the workman as also the employer to give an opportunity to the employer to prove the misconduct against the workman before the labour court or the tribunal by leading evidence, both oral as well as documentary. Therefore, the apex court has held that why the opportunity has been given just to avoid the duplication and to avoid the marry go round situation to decide the legality and validity of the inquiry again and again and not to decide finally the issue and in such a situation, both the workman as also the employer would ultimately be the sufferer in such a situation and, therefore, this is the object of affording opportunity to the employer to prove the misconduct before the labour court or the tribunal in case of 'no inquiry' or 'defective inquiry'. Therefore, in such a situation, it is the duty of the employer to consider the workman in service otherwise in absence of considering him in service, the employer is not entitled to hold the departmental inquiry against the workman who is not in service. Therefore, it is the prerequisite and precondition for the employer to treat the workman to be under suspension pending such departmental inquiry and to pay him the subsistence allowance for such a period. Therefore, in such a situation, the workman shall not remain without subsistence allowance while facing the departmental inquiry and, therefore, according to my view, the principle of 'relate back' is applicable as held by the Hon'ble Supreme Court in the decision reported in AIR 1997 SC 2661 but this principle which has been decided will not come in the way if the workman is given the subsistence allowance during the pendency of the proceedings before the labour court or the tribunal considering him under suspension and in such a situation, the employer will be entitled to hold the departmental inquiry against the workman before the labour court or the tribunal by leading oral as also documentary evidence to prove the misconduct against the workman. These principles have also been considered by the apex court in the decision reported in AIR 1986 SC 1168.

The issue for consideration in case before hand is that an employer has taken decision to dismiss the protected workman for the misconduct which has been committed by the protected workman. Therefore, it is obligatory on the part of the employer to seek permission from the competent authority before whom the dispute is pending for dismissing the protected workman. In such a

situation, the question arose that once when the employer has taken decision to dismiss the protected workman and ask for a permission before the concerned authority then, the employer is not duty bound to pay any allowances or wages to the protected workman during the period of permission application and the argument which was advanced by the employer was that if ultimately the workman would succeed and permission is not granted, then, naturally, the workman will be entitled to full wages for the intervening period of permission application. This issue was considered by the apex court and it was held that the very issue of relationship of master and servant has undergone change since the date on which the case reported in AIR 1959 SC page 1342 was decided. It was also held that an unscrupulous management may by all possible means, delay the proceedings so that the workman may be driven to accept its terms instead of defending himself in proceedings under section 33 sub clause (3) of the Act. To expect the ordinary workman to wait for such a longer time in these days is to expect something which is very unusual to happen. Denial of payment of at lease small amount by way of subsistence allowance would amount to gross unfairness. According to the view taken by the apex Court, denial of payment of subsistence allowance to the workman placed under suspension during the pendency of the proceedings under section 33(3) amounts to violation of the principles of natural justice. Since it is difficult to anticipate the ultimate result of the application made before the tribunal, it is reasonable to hold that the workman against whom the application is made should be paid some amount by way of subsistence allowance to enable him to maintain himself and his family too to meet with the expenses of litigation before the tribunal or the labour court and if no amount is paid during the pendency of such an application, it has to be held that the workman concerned has been denied reasonable opportunity to defend himself in the proceedings before the tribunal. According to my view, such denial would violate the principles of natural justice and consequently shall vitiate the proceedings before the tribunal and would also not be in consonance with the mandate of Article 21 of the Constitution of India. In that case, there was no material on record to establish that the workman was having sufficient means to defend himself before the tribunal. If the order passed at the conclusion of the domestic inquiry is the only one of suspension and even though the management has decided to dismiss him where the workman has a chance of being reinstated with back wages on the permission being refused under section 33(3) of the Act, it cannot be said

that the workman is not entitled to any monitory relief at all. In such a case, it would be the right of the workman to receive some reasonable amount which may be fixed either by the Standing Orders or in absence of any Standing Orders by the authority before which the application is pending by way of subsistence allowance during the pendency of application under section 33(3) of the Act with effect from the date of suspension, as per the principles laid down by the apex court in decision of Khemchand reported in AIR 1963 SC 687.

After considering the decision of the apex court reported in AIR 1986 SC 1168, in the present case also, same situation has arisen because in this case also, the workman has been dismissed from service on the basis of the departmental inquiry which was held by the respondent bank and the same was declared invalid and then permission was sought by the employer bank to prove the misconduct and in such inquiry, ultimately, if the inquiry has been held against the workman and the misconduct is found to be proved, then, during the pendency of such proceedings, the workman cannot defend these proceedings without subsistence allowance and, therefore, the facts of the present petition would be squarely covered by the ratio of the decision of the apex court in case of Fakirbhi having identical situation because in case of permission application, the decision has been taken by the employer to dismiss the protected workman and unless and until the permission is granted by the appropriate authority, the dismiss order cannot have any effect. Similarly, in case of defective inquiry also, if the defective inquiry has been declared by the labour court or industrial tribunal, then, the permission application filed by the employer with a request to the labour court or the tribunal to give permission and to give opportunity to prove misconduct against the workman. In both the proceedings, the workman remained without any subsistence allowance and without any wages. Therefore, the workman has to defend against the employer and the proceedings may be delayed and the workman may be compelled to surrender agree to some terms of the employer and, therefore, according to my view, the workman is entitled to have some subsistence allowance allowance during the pendency of the proceedings before the Tribunal or the Court where the inquiry has been declared invalid and the employer wants to prove the charge of misconduct against the workman,

Learned advocate Mr.Pathak has submitted that when the departmental inquiry which was conducted against the petitioner by the Bank has been held to be invalid

vide Exh. 11, and subsequently on permission being granted by the tribunal, the respondent bank has led oral evidence and produced documentary evidence to prove the misconduct against the petitioner workman, then, in such circumstances, it is the duty of the industrial tribunal or the labour court to consider the gap of intervening period during which the workman has remained without any relief. Therefore, Mr. Pathak has submitted that considering the principles of relate back theory, the ultimate award passed by the tribunal may relate back to the original date of dismissal but during the intervening period, when fresh inquiry has been conducted against the workman before the tribunal, then, the tribunal ought to have ordered the bank to pay subsistence allowance to the petitioner pending the inquiry proceedings before it. In not doing so, according to Mr. Pathak, the tribunal has erred and at least, that relief should be granted by this Court. Mr. Shelat, the learned advocate for the respondent has submitted that once the award passed by the tribunal and if it relate to the original date of dismissal, then, the workman is not entitled to any amount of subsistence allowance for intervening period.

I have considered the submissions of both the learned advocates. It is a settled principle of law that where the employer has failed to make inquiry before dismissing or discharging the workman, it is open for him to justify the action before the tribunal by leading all relevant evidence before it. In such a case, the employer would not have the benefit which he had in cases where the domestic inquiries have been held to be legal and valid. In such cases, entire matter would be open before the tribunal which will have jurisdiction not only to go into the limited question but also to satisfy itself on the facts adduced before it by the employer and to come to the conclusion whether the order of dismissal or discharge was justified or not. In case of Motipur Sugar Factory, reported in AIR 1965 SC page 1803, the apex Court has held that the defective inquiry and no inquiry shall stand on the same footing as in case of 'no inquiry' as well as in case of 'defective inquiry', the tribunal would have jurisdiction to go into the facts and the employer would have to satisfy the tribunal on facts that the order of dismissal and/or discharge from service was proper or not. In case of Motipur Sugar Factory (supra), the apex court has considered the reason for giving such an opportunity to the employer to prove and/or establish the misconduct before the tribunal by leading oral as well as documentary evidence. It has been held that where the employee is dismissed by the employer without holding any departmental inquiry, the

action of dismissal must be set aside on that sole ground. After setting aside of the order of dismissal order on that ground alone, the employer will proceed to held the inquiry against the delinquent employee and will pass the order of dismissal once again and in that case, once again, the tribunal will be required to examine the preliminary issue as to the legality and/or validity of the departmental inquiry. In that eventuality, employer will first be required to reinstate the workman in service before holding the inquiry. Therefore, applying the same analogy in case of 'defective inquiry' before the labour court or the tribunal, it is just and proper to direct the respondent bank to treat the workman petitioner to have been suspended for the purpose of inquiry and to pay him some amount of subsistence allowance for the intervening period because if the subsistence allowance is not paid pending the inquiry before the tribunal or before the labour court or the tribunal itself, then, the workman will not be able to survive and to incur the expenses for defending the proceedings. These are the considerations and reasons for giving an opportunity to the employer to prove the misconduct of the workman before the tribunal and in doing so, the tribunal tries the merits of the matter itself. The approach of the tribunal is in consistency with the law laid down by the apex Court. However, since the workman has not been ordered to be paid the subsistence allowance pending the proceedings from the date of the order till the date of impugned award, the respondent bank is required to be directed to pay to the petitioner workman subsistence allowance pending the proceedings before the tribunal from the date of the impugned order of dismissal till the date of the impugned award passed by the tribunal by treating the workman to be under suspension for the intervening period in order to establish the relationship of master and servant between the bank and the workman. Even as per the dicta of the apex court in case of Fakirbhai (supra), subsistence allowance will have to be paid during the intervening period. The liability and obligation of the employer under the Standing Orders to pay the subsistence allowance will be deemed to be continue beyond the date of termination until the misconduct is established. This flows by reading the principles laid down in case of Ludhbhut Singh (1972(1) LLJ 180) read with the case of Fakirbhai (AIR 1986 SC 1168). This amount of subsistence allowance will be payable for the period as provided in the Standing Orders. In case where the standing orders are not providing for such payment during the period of suspension, where there are no standing orders, same shall be payable as per the relevant service regulations

of the establishment. Hence, in view of the above discussion, where the employer is given such a concession, the fairness requires that the workman/employee is protected from starvation during the said period so that he can appropriately defend the proceedings against him. In case of Regional Director ESI versus Popular Automobiles reported in 1997(7) SCC, 665, it has been observed that it has to be kept in view as noted earlier that the subsistence allowance paid to the suspended employee is not refundable or recoverable even though ultimately suspended employee is removed from service after the misconduct alleged against him is established against him. The principles laid down in the said decision shall apply to the subsistence allowance at the departmental level as also before the tribunal since the inquiry before the tribunal is being held at the instance of the employer and, therefore, the doctrine of relate back will not affect the grant of subsistence allowance, in any manner whatsoever.

In the decision reported in AIR 1998 SC page 185, while referring the question to the larger bench in respect of the principles of relate back, the apex court has considered the provisions of section 10, 10A and 33 of the ID Act. In the said decision, the earlier decision reported in AIR 1963 SC 1756 has also been considered. IN the said decision also, the misconduct was established before the labour court but the labour court has granted full wages from the date of dismissal till the date of award to the workman. In this case also, ultimately while placing the appeal for final disposal before the Constitutional Bench of the apex court, the apex court has granted interim relief against the order of the division bench of the High Court to the extent of 50 per cent of the back wages and, therefore, the result is that 50 percent of the back wages is required to be paid by the employer to the workman.

Therefore, considering all these facts and circumstances of the case in light of the legal position discussed hereinabove, as per my view, since the inquiry was held to be defective as per the finding of the tribunal on the preliminary issue, and since the employer bank was given concession to prove the misconduct before it by leading oral as well as documentary evidence, the workman is entitled to have subsistence allowance from the date of dismissal till the date of the impugned judgment and award passed by the tribunal.

Recently, in case of M. Paul Antony versus Bharat Gold Mines Ltd. reported in 1999 Lab. I.C. page

1566, it has been held by the apex court that the suspension notwithstanding nonpayment of subsistence allowance is an inhuman act which has a unpropitious effect on the life of an employee. When the employee is placed under suspension, he is demobilized as salaray is also paid to him at a reduced rate under the nick name of subsistence allowance. So that the employee may sustain himself. The very object of paying the reduced salary to the employee during the period of suspension allowance would be frustrated if even the subsistence allowance is not paid because the subsistence allowance means supporting protection especially a minimum livelihood. The act of non payment of subsistence allowance can be linked to slow poisoning as the employee, if not permitted to sustain himself on account of non payment of subsistence allowance, the employee would gradually starve himself to death.

In light of my above observations, the view taken by the tribunal that the misconduct has been serious and it is relating to the dishonesty and temporary misappropriation which as been found to be proved by the employer by leading evidence before the tribunal is just and proper and the tribunal has not erred in justifying the order of dismissal in view of its aforesaid conclusion. I am not disturbing the finding and the ultimate result and decision of the tribunal. I am considering the submission of Mr. Pathak that pursuant to the conclusion of the tribunal on preliminary issue about the legality of the inquiry, fresh inquiry was held and evidence was led and misconduct was proved before the tribunal and, therefore, the workman is entitled to subsistence allowance according to the service rules for the intervening period from the date of dismissal till the date of award passed by the tribunal. I have considered the submission of Mr. Pathak. I am of the opinion that in such a situation, when the departmental inquiry is vitiated and fresh inquiry has been held by the employer before the tribunal, the workman is entitled for subsistence allowance according to the rules and regulations binding to the respondent bank by treating him under suspension because if the petitioner is not treated to have been suspended for the intervening period, then, there will be no relationship of master and servant between the petitioner and the respondent bank and in such a situation, the respondent cannot initiate inquiry against the person who is not its employee and, therefore, for the intervening period, the petitioner should be given some subsistence allowance to enable him to maintain himself and his family members and also to meet with the expenses of litigations and if the same is

not paid during the pendency of reference, then the workman would be deprived of his right to subsist and defend the proceedings and the same would would not be in consonance with the mandate of Article 21 of the Constitution of India.

In view of the above discussion, the ultimate findings as also the order of the tribunal do not call for any interference and the same should be confirmed. However, for the reasons as aforesaid, for the period from the date of order of dismissal till the date of the award passed by the tribunal, the workman is entitled to subsistence allowance from the respondent bank.

Accordingly, I pass the following order.

The respondent bank is directed to pay to the petitioner subsistence allowance from the date of the order of dismissal dated 28.10.1975 till the date of the order passed by the Tribunal i.e. 22nd June, 1987. Rest of the award passed by the tribunal is confirmed. The punishment of dismissal based on the proved misconduct is confirmed. The respondent bank shall pay to the petitioner subsistence allowance in accordance with the service rules of the respondent bank prevailing at the relevant time for such period within three months from the date of receiving writ of this Court. With these directions, this petition is partly allowed. Rule is made absolute to that extent with no order as to costs.

Dt. (H.K.Rathod,J.)

Vyas